Office Supreme Court, U.
FILED
OCT 7 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

VS.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY,
STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION ON APPEAL

JOHN H. MILEY,
Counsel for Appellant.

Utterback Typesetting Co., Oklahoma City

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY,
STATE OF OKLAHOMA,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

STATUTORY PROVISIONS BELIEVED TO SUSTAIN THE JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54, entitled "An Act in Reference to Writs of Error," provides:

"The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of April 26, 1928, C. 440, 45 Stat. 466, amending the Act of January 31, 1928, C. 14, Sec. 2, 45 Stat. 54, provides:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to courts, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The judgment sought to be reviewed was entered on the 17th day of May, 1932 (R. 89, 90).*

The application for appeal was presented on the 12th day of August, 1932 (R. 13).

C.

NATURE OF CASE AND RULING BELOW

The question involved in this case, which is virtually the same as the question involved in the case of *Indian Territory Illuminating Oil Company* v. *Board of Equalization of Tulsa County, Oklahoma*, No. 356, now pending before this Court, is whether 383, 307 barrels of crude oil located in certain tanks in Payne County, State of Oklahoma, on January 1, 1928, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof, for the year 1928 (R. 32, 33).

The oil in question was produced by the appellant, prior to January 1, 1928, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file with the Clerk of this Court. The record has not yet been printed.

of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32, 33, 54, 68, 70, 91, 97). The oil was produced by appellant under and pursuant to leases executed by the several allottees and approved by the Secretary of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 54, 68, 91, 97). The said oil so produced, together with other oil, was immediately after production piped into the storage tanks where it has remained since in its original state. The said oil so produced by appellant had not been disposed of by it from the time of production thereof, until and throughout the entire tax period in question (R. 31-34, 54, 68, 91).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1928, by virtue of certain statutes of the State of Oklahoma, particularly, to-wit: Sec. 9814, Compiled Oklahoma Statutes, 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Sec. 9627, C. O. S., 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for the storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof."

And Sec. 9666, C. O. S., 1921, as amended by Ch. 209, Session Laws, Oklahoma, 1927, p. 258, provides:

> "The County Assessor shall on the 15th day of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January first * * *."

It is the contention of the appellant that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S., 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States, in that the appellant is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit. (*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Oil Companies,* 247 U. S. 503; *Choctaw O. & G. R. Co.* v.

Harrison, 235 U. S. 292; *McCulloch* v. *Maryland,* 4 Wheat 316).

The validity of the statutes of the State, as applied to the oil in question on the ground aforesaid, was drawn in question at the inception of the proceeding and maintained throughout, and the final decision of the Supreme Court of the State of Oklahoma, from which this appeal was taken, was in favor of the validity of the Statute as so applied.

The appellant, in preparing and filing with the County Assessor its corrected assessment list or schedule of property located in Payne County, Oklahoma, claimed that notwithstanding said State Statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495 and 34 Stat. L. 267), which claim was denied and the said property was added to the assessment roll as property subject to ad valorem taxation for the year 1928, and a tax of $7,805.72 was levied against said oil for said year (R. 28-31, 37, 70).

Thereupon the appellant, as provided by the laws of the State of Oklahoma, paid the first half of said tax under protest (R. 63, 69) and thereafter duly filed in the office of the County Clerk (R. 26), its complaint wherein the appellant prayed that the Board of County Commissioners of Payne County, Oklahoma, the appellee herein, issue its certificate in error cancelling and setting aside the tax levy

on the crude oil as aforesaid and further, that it order a refund to the petitioner of so much of the said tax on said oil as had been paid (R. 34, 35). After a hearing as provided by the laws of the State of Oklahoma, the appellee denied the relief therein prayed for (R. 26) whereupon the appellant in accordance with the laws of the State of Oklahoma, duly appealed to the District Court of Payne County, Oklahoma (R. 26, 27).

The said District Court, upon regular hearing, sustained the claim of the appellant (R. 68, 70) and directed the said appellee to order a refund to the appellant in the amount of $7,805.72, that being the amount of the tax levied on said oil and which had been paid at the time of the rendition of said judgment by the appellant under protest (R. 70).

From such judgment, the appellee herein, as further provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 89, 90), denying the contention of the appellant, and rendered judgment that said oil was subject to taxation for said year and that said tax imposed on said oil was valid. In the concluding paragraph of the opinion of the Supreme Court (R. 99) it was stated:

"There is no reason why the Indian Territory Illum-

inating Oil Company should not pay taxes upon this oil, as it enjoys the protection of the State government. There is neither defined exemption by positive law, or undefined exemption from rules of policy.

"The case is reversed, with directions to the court below to revoke its order directing the county commissioners to strike this property from the assessment roll, and requiring the Board of County Commissioners to order a refund of taxes paid under protest by the oil company in the aggregate of $7,805.72. The tax collecting authorities of Payne County are directed to take the necessary steps to collect the amount rebated with penalties in case the money has been returned to the oil company. The defendant in error will be taxed with the costs here and in the court below."

No petition for rehearing was filed in the said Supreme Court of the State of Oklahoma. The time within which such could have been filed in said State Supreme Court in this cause, had the appellant elected to file the same, expired June 21, 1932.

The Supreme Court of the State of Oklahoma is the highest Court of said State in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

D.

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Jaybird Mining Company v. *Weir*, 271 U. S. 609;

Gellespie v. *State of Oklahoma*, 257 U. S. 501;

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted,

JOHN H. MILEY,
Counsel for Appellant.

FILE COPY

Office Supreme Co
FILED
NOV 22
CHARLES ELMORE

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

JOHN H. MILEY,
Counsel for Petitioner.

Unterbach Typesetting Co., Oklahoma City

SUBJECT INDEX

Page

I. The Opinions of the Courts Below 1

II. Jurisdiction 2

III. Statement of the Case 11

IV. Specification of Errors 12

V. Argument 16

Summary of Argument 11

Point B. The lessee of restricted Seminole land for oil and question of substance in a way not in accord with the applicable decisions of this Court 11

Point B. The lessee of restricted Seminole land for oil and gas mining purposes, under a lease executed pursuant to Sec. 2 of the Act of May 27, 1908 (Ch. 199, 35 Stat L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not subject to taxation by the state while held in storage in its original form prior to sale thereof by the lessee 11

TABLE OF CASES CITED

Board of County Commissioners of Payne County v. Indian Territory Illuminating Oil Company, 14 Pac. (2d) 929 1

Board of Equalization of Tulsa County v. Indian Territory Illuminating Oil Co., 13 Pac. (2d) 585 3

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292 ..... 6, 15

Citizens Nat. Bank of Cincinnati v. Durr, 257 U. S. 99 10

Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282 10

Dana v. Dana, 250 U. S. 220 10

Gillespie v. Oklahoma, 257 U. S. 501 ..... 5, 9, 15

Howard v. Oil Companies, 247 U. S. 503 ..... 6, 15

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522 ..... 5, 15

Jaybird Mining Co. v. Weir, 271 U. S. 609 ..... 5, 9, 15

Large Oil Co. v. Howard, 248 U. S. 549 ..... 6, 15

McCulloch v. Maryland, 4 Wheat 316 ..... 6, 15

Table of Statutes Cited

	Page
Act of April 26, 1906, Chap. 1876 (34 Stat. 137)	6
Act of June 16, 1906, Chap. 3335 (34 Stat. 267)	6
Act of June 28, 1898, Chap. 517 (30 Stat. 567)	6
Act of May 27, 1908, Chap. 199 (35 Stat. 312)	4, 6, 15
Act of May 10, 1928, Chap. 517 (45 Stat. 495)	6
Compiled Oklahoma Statutes 1921, Chap. 84	6, 13
Section 9627	5, 13
Section 9666, as amended by Ch. 209, Session Laws of Oklahoma, 1927, p. 258	5, 13
Section 9814	5, 13
Sec. 237 (b) (c) of the Judicial Code, as amended by the Act of February 14, 1925. 43 Stat. 937	2, 10

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

The opinions of the courts below have not yet been officially reported. The opinion of the Supreme Court (the highest court of the State) is unofficially reported in *Board of Commissioners of Payne County* v. *Indian Territory Illuminating Oil Co.*, 14 Pac. Rep. (2nd Series) 929. The opinion is dated May 17, 1932, and is copied *in full* in the record (R. 90).*

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file in this Court. The record had not been printed at the time this brief was prepared.

II.

Jurisdiction

1. The statutory provisions believed to sustain the jurisdiction are Sec. 237 (b) (c) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. L. 937 (Sec. 344, U. S. C. A.), which read in part as follows (italics supplied to indicate provisions particularly applicable):

> "Sec. 237 (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error (now appeal, Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54), any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; *or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;* and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to review on a writ of error (now appeal) in a case where such a right is conferred by the preceding paragraph; *nor shall the fact that a review on a writ of error* (now appeal) *might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.*
>
> "(c) If a writ of error (now appeal) be improvi-

dently sought and allowed under this section in a case where the proper mode of invoking a review is by petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error (now appeal) was allowed shall be regarded and acted on as a petition for certiorari, and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ or error (now appeal) was allowed * * *."

2. The date of the judgment to be reviewed is May 17, 1932 (R. 89), pursuant to the opinion of the Court filed the same day (R. 90). A petition for rehearing was not filed. The petition for appeal to this Court (R. 3), accompanied by an assignment of errors and a prayer for reversal (R. 9) was presented to the Chief Justice of the Supreme Court of Oklahoma on the 12th day of August, 1932, and appeal was allowed by him on that date (R. 13). Appeal bond was presented and approved on the same date (R. 15). Citation was issued on the 12th day of August, 1932 (R. 1), and duly served on the 23rd day of August, 1932 (R. 1). The transcript of the record of the Supreme Court of Oklahoma, including all the appeal papers, was lodged in the office of the Clerk of this Court on September 8, 1932.

3. The nature of the case and the ruling below are as follows:

The question involved in this case, which is virtually the same as the question involved in the case of *Indian Territory Illuminating Oil Co.* v. *Board of Equalization of Tulsa County, Oklahoma,* No. 356, now pending before this

Court, is whether 383,307 barrels of crude oil located in certain tanks in Payne County, State of Oklahoma, on January 1, 1928, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof for the year 1928 (R. 32, 33).

The oil in question was produced by the petitioner (appellant) prior to January 1, 1928, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32, 33, 54, 68, 70, 91, 97). The oil was produced by petitioner (appellant) under and pursuant to leases executed by the several allottees and approved by the Secretary of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 54, 68, 91, 97). The said oil so produced, together with other oil, was immediately after production piped into the storage tanks, where it has since remained in its original state. The said oil so produced by appellant had not been disposed of by it from the time of production thereof, until and throughout the entire tax period in question (R. 31-34, 54, 68, 91).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1928, by virtue of

certain statutes of the State of Oklahoma, particularly, to-wit: Section 9814, Compiled Oklahoma Statutes 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Section 9627, C. O. S. 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for the storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof."

And Section 9666, C. O. S. 1921, as amended by Chapter 209, Session Laws, Oklahoma, 1927, p. 258, provides:

> "The County Assessor shall on the 15th day of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January 1 * * *."

It is the contention of the petitioner (appellant) that it is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit (*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Territory Illuminating Oil*

Co. v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Oil Companies,* 247 U. S. 503; *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *McCulloch* v. *Maryland,* 4 Wheat 316), and it is immune from taxation on such oil so produced and held in storage in its original state and that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S. 1921, relating to revenue and taxation, providing for assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States.

The immunity from taxation and validity of the statutes of the State, as applied to the oil in question on the grounds aforesaid, was drawn in question at the inception of the proceeding and maintained throughout, and the final decision of the Supreme Court of the State of Oklahoma, from which this appeal was taken, was in favor of the validity of the statute as so applied.

The petitioner (appellant), in preparing and filing with the County Assessor its corrected assessment list or schedule of property located in Payne County, Oklahoma, claimed that notwithstanding said State statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495; and 34 Stat. L. 267),

which claim was denied and the said property was added to the assessment roll as property subject to ad valorem taxation for the year 1928, and a tax of $7,805.72 was levied against said oil for said year (R. 28-31, 37, 70).

Thereupon the petitioner (appellant), as provided by the laws of the State of Oklahoma, paid the first half of said tax under protest (R. 63, 69), and thereafter duly filed in the office of the County Clerk (R. 26) its complaint wherein the appellant prayed that the Board of County Commissioners of Payne County, Oklahoma, the respondent (appellee) herein, issue its certificate in error cancelling and setting saide the tax levy on the crude oil as aforesaid and, further, that it order a refund to the petitioner of so much of the said tax on said oil as had been paid (R. 34, 35). After a hearing as provided by the laws of the State of Oklahoma, the respondent (appellee) denied the relief therein prayed for (R. 26), whereupon the petitioner (appellant), in accordance with the laws of the State of Oklahoma, duly appealed to the District Court of Payne County, Oklahoma (R. 26, 27).

The said District Court, upon regular hearing, sustained the claim of the petitioner (appellant) (R. 68, 70), and directed the said respondent (appellee) to order a refund to it in the amount of $7,805.72, that being the amount of the tax levied on said oil and which had been paid at the time of the rendition of said judgment by the petitioner (appellant) under protest (R. 70).

From such judgment, the respondent (appellee) herein, as further provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 89, 90), denying the contention of the petitioner (appellant), and rendered judgment that said oil was subject to taxation for said year, and that said tax imposed on said oil was valid. In the concluding paragraph of the opinion of the Supreme Court (R. 99) it was stated:

> "There is no reason why the Indian Territory Illuminating Oil Company should not pay taxes upon this oil, as it enjoys the protection of the State Government. There is neither defined exemption by positive law, or undefined exemption from rules of policy.
>
> "The case is reversed, with directions to the court below to revoke its order directing the county commissioners to strike this property from the assessment roll, and requiring the Board of County Commissioners to order a refund of taxes paid under protest by the oil company in the aggregate of $7,805.72. The tax collecting authorities of Payne County are directed to take the necessary steps to collect the amount rebated with penalties in case the money has been returned to the oil company. The defendant in error will be taxed with the costs here and in the court below."

The Supreme Court of the State of Oklahoma is the highest court of said State in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

4. Counsel for petitioner was of the opinion that the question of the proper mode to invoke the jurisdiction to

secure a review of the case had been definitely settled and was ruled by *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, which involved the validity of an ad valorem tax assessed by the officials of the State under the same State statutes here involved, upon the product of the restricted land of an Indian pursuant to a lease executed by the Indian with the approval of the Secretary of the Interior. In that case this Court said in concluding the opinion:

> "In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal Government within the principle of the cases cited.
>
> "From abundance of caution the company presented a petition for a writ of certiorari; *but, as a writ of error lies* (now appeal) the petition will be denied. *Gillespie* v. *Oklahoma, supra,* 506 (66 L. ed. 341, 42 Sup. Ct. Rep. 171)."

The *Gillespie Case,* 257 U. S. 501, cited in the foregoing, involved the validity of a state tax upon the net income derived by a lessee of restricted Indian lands obtained from his share of the sale of oil and gas under such leases. The Supreme Court of the State had sustained the validity of the tax, and in reversing the decision on the ground that such income of an instrumentality of the United States was not subject to the tax, this Court concluded its opinion as follows:

> "*As a writ of error* (now appeal) *lies in this case* the petition for certiorari that was presented for greater caution will be denied. *Dahnke-Walker Mill Co.* v. *Bondurant,* December 12, 1921" (257 U. S. 282).

In *Dahnke-Walker Mill Co.* v. *Bondurant,* 257 U. S. 282, this Court considered the question at length, and held that a case was rightfully brought to this Court by writ of error (now appeal) where the state court applied and enforced to appellant's disadvantage a state statute (otherwise valid) which the appellant seasonably insisted as so applied and enforced was repugnant to the Constitution.

Since it now appears from the memorandum entered November 7, 1932, dismissing the appeal herein, that counsel has misinterpreted these decisions, it is respectfully submitted that although the validity of the state statutes under which the tax was imposed and sustained was not drawn in question, in their entirety, the jurisdiction to review by certiorari is conferred by that portion of Sec. 237 (b) as follows:

> "* * * or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States."

In the following cases involving claims of immunity from state taxation on Federal grounds, it was held that review might be had by certiorari:

Citizens Nat. Bank of Cincinnati v. *Durr,* 257 U. S. 99.

Dana v. *Dana,* 250 U. S. 220.

III.

Statement of the Case

The case has been rather fully stated in paragraph 3 under the heading "Jurisdiction."

The claim that the crude oil in question was exempt from taxation was made at the inception of the proceeding before the Board of County Commissioners. It was stated in the complaint to that board (R. 28, 32) as follows:

> "That the 212,210 barrels of crude oil shown as one of the items above set forth (added to the assessment list by the county assessor) is and was at the time the same was rendered and certified by the county assessor, oil produced from 'restricted Indian lands' from which all the interests of the Indians had not been disassociated; that in so producing said oil and conserving the same this complainant was acting under and by virtue of leases duly approved by the Secretary of the Interior and was functioning as a United States governmental instrumentality; and that by reason thereof said production so obtained is not subject to taxation by the State of Oklahoma under decisions of the United States Supreme Court" (R. 32).

The same claim was made with reference to the remainder of the oil involved (R. 33-34).

The case was tried in the State District Court on an agreed statement of facts (R. 54, 62).

The court found and concluded as follows:

> "The court finds that the oil, alleged and referred to in the complaint herein, amounting to 383,307 barrels was produced in Seminole County, Oklahoma, from land

belonging to restricted Indians, and thereafter stored in Payne County, Oklahoma, in steel storage tanks at the time when all property in said county was required to be assessed for taxation purposes during the tax year 1928. That 212,210 barrels of such oil valued for taxation purposes at $214,326 was stored in Eagle township, school district No. 91, Payne County, Oklahoma, and the remainder, 171,097 barrels valued at $169,386 was stored at such time in tanks in Eagle township, school district No. 102, Payne County, Oklahoma. That by reason of the fact that such oil was produced from the lands of restricted Indians, the said appellant was acting as a governmental instrumentality and therefore all of said oil was exempt from any and all forms of ad valorem taxation while stored in tanks in Payne County, Oklahoma'' (R. 68-69).

The Board of County Commissioners appealed to the Supreme Court of the State. That Court disagreed with the conclusion of law of the trial court. It held that there was no provision of the State Constitution or state statutes exempting this oil from taxation, and denied the claim of immunity from state taxation as an agency or instrumentality of the United States Government.

IV.

Specification of Errors

1. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Payne County, Oklahoma, and in holding and deciding that the said District Court of Payne County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not

subject to ad valorem taxation for the year 1928, by the State of Oklahoma, or any political subdivision thereof.

2. The Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Payne County, Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574 and succeeding sections of Chapter 84, Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said statutes when applied to and construed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said statutes as so applied are repugnant to the Constitution, treaties and laws of the United States.

4. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that the acts of the

county assessor, the county treasurer and the Board of County Commissioners of Payne County, State of Oklahoma, and the authority exercised by them and each of them under, and the authority conferred and vested in them by, the said statutes of the State of Oklahoma mentioned specifically in assignment number three herein and above set forth, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid and in rendering a decision in favor of their validity and in not holding said statutes and the authority so exercised by the officials aforesaid under said statutes repugnant to the Constitution, treaties and laws of the United States.

5. The Supreme Court of the State of Oklahoma erred in sustaining the above-mentioned statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

6. The Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by

the petitioner is and was exempt from ad valorem taxation as claimed by said petitioner under the Constitution, treaties and laws of the United States.

V.

Summary of the Argument

Point A: The State Supreme Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court, which decisions are as follows:

Jaybird Mining Co. v. *Weir*, 271 U. S. 609.
Gillespie v. *Oklahoma*, 257 U. S. 501.
Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522.
Large Oil Co. v. *Howard*, 248 U. S. 549.
Howard v. *Oil Companies*, 247 U. S. 503.
Choctaw O. & G. R. Co. v. *Harrison*, 235 U. S. 292.
McCulloch v. *Maryland*, 4 Wheat. 316.

Point B: The lessee of restricted Seminole Indian land for oil and gas mining purposes, under a lease executed pursuant to Section 2 of the Act of May 27, 1908 (Chapter 199, 35 Stat. L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not subject to taxation by the State while held in storage in its original form, prior to sale thereof by the lessee.

ARGUMENT

On the same day on which the opinion of the State Court in the instant case was rendered, an opinion was rendered by the same Court in a similar case, wherein the same question was involved as in the instant case. *Board of Equalization of Tulsa County* v. *Indian Territory Illuminating Co.*, 13 Pac. (2d) 585. The later case is now pending before this Court. (*Indian Territory Illuminating Oil Co.* v. *Board of Equalization of Tulsa Co.*, No. 356.) The argument given therein is fully applicable to the instant case, and as the two cases have thus far been considered together by this Court, to obviate unnecessary repetition, we respectfully refer to and adopt the argument advanced therein as the argument of the petitioner in the instant case.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that if this Court has not jurisdiction to review the decision of the Supreme Court of Oklahoma by appeal, that to such an end a writ of certiorari should be granted, and the decision finally reversed.

JOHN H. MILEY,
Counsel for Petitioner.